Granted 2/22/94

# 93-986

No. _____



IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1993

MARGARET McINTYRE,

*Petitioner*,

v.

OHIO ELECTIONS COMMISSION,

*Respondent*.

**Petition for a Writ of Certiorari to the Supreme Court of Ohio**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Did the Court below err in upholding an Ohio statute that imposes a flat ban on distribution of anonymous political campaign leaflets?

2. Even if facially valid, can Ohio's statute banning anonymous political campign literature be applied to punish petitioner's distribution of political leaflets advocating defeat of a nonpartisan referendum on school taxes without violating the First Amendment?

## LIST OF PARTIES

The two parties to the proceedings and in this Court are Petitioner Margaret McIntyre, the defendant-appellant below, and Respondent Ohio Elections Commission, the enforcement agency and appellee below.



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**MARGARET McINTYRE,**

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**Petition for a Writ of Certiorari to the Supreme Court of Ohio**

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Petitioner Margaret McIntyre respectfully requests that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Ohio entered in the above entitled case on September 22, 1993.

## OPINIONS BELOW

The opinion of the Supreme Court of Ohio, review of which is sought by this petition, is reported as *McIntyre* v. *Ohio Elections Commission*, 67 Ohio St.3d 391, (1993). It is reprinted in the appendix of this petition at page A-1. The finding of the Ohio Elections Commission is represented in the appendix at page A-40. The opinions of the Franklin County Court of Common Pleas and the Court of Appeals of Ohio for

the Tenth Appellate District are unpublished and are reprinted in the appendix at pages A-16 and A-33 respectively.

## JURISDICTION

On March 30, 1989, Petitioner Margaret McIntyre was charged with violating Ohio Revised Code § 3599.09 which prohibits the distribution of campaign leaflets that do not contain the name of the person who prepares and distributes them. On March 30, 1990, the Ohio Elections Commission issued its decision finding that petitioner violated R.C. § 3599.09 and fined her $100. On April 6, 1990, petitioner appealed this case to the Franklin County Court of Common Pleas. On October 2, 1990, the Court of Common Pleas reversed the decision of the Ohio Elections Commission and held that § 3599.09 was unconstitutional as applied to the petitioner. On April 7, 1992, the Court of Appeals of Ohio for the Tenth Appellate District reversed the Court of Common Pleas. On September 22, 1993, the Ohio Supreme Court affirmed the appellate court and held that § 3599.09 is constitutional on its face and as applied to the facts of this case.

The jurisdiction of this Court to review the September 22, 1993 judgment of the Ohio Supreme Court is invoked under 28 U.S.C. 1257(a).

## THE CONSTITUTIONAL PROVISIONS AT ISSUE

*Constitution of the United States, Amendment I.*

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

*Constitution of the United States, Amendment XIV, Section 1.*

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.



## THE STATUTORY PROVISION AT ISSUE

*Ohio Revised Code § 3599.09*

> (A) No person shall write, print, post, or distribute, or cause to be written, printed, posted, or distributed, a notice, placard, dodger, advertisement, sample ballot, or any other form of general publication which is designed to promote the nomination or election or defeat of a candidate, or to promote the adoption or defeat of any issue, or to influence the voters in any election, or make an expenditure for the purpose of financing political communications through newspapers, magazines, outdoor advertising facilities, direct mailings, or other similar types of general public political advertising, or through flyers, handbills, or other non-periodical printed matter, unless there appears on such form of publication in a conspicuous place or is contained within said statement the name and residence or business address of the chairman, treasurer, or secretary of the organization issuing the same, or the person who issues, makes, or is responsible therefore. . . . This section does not apply to the transmittal of personal correspondence that is not reproduced by machine for general distribution.[1]

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[1] The full text of this provision appears in the appendix at page A-36.

## STATEMENT OF THE CASE

On March 30, 1990, the Ohio Elections Commission found Petitioner Margaret McIntyre guilty of violating R.C. § 3599.09 for distributing leaflets that she had prepared to oppose passage of a local ballot issue. The Commission imposed a $100 fine because the leaflets did not include her name and address. 67 Ohio St. 3d at 392[2]

The sequence of events leading to the fine began at the Blendon Middle School in Westerville, Ohio on the evening of April 27, 1988. *Id.* at 391. There, Ms. McIntyre, her son, and his girlfriend distributed leaflets opposing passage of the tax levy that was to be voted on in a referendum during the following week. *Id.* Petitioner was leafletting that evening because the Blendon Middle School was the site of a regularly scheduled school meeting at which the Westerville Superintendent of Schools was to be addressing the merits of the tax levy. *Id.* During the meeting, the superintendent made specific reference to statements contained in McIntyre's leaflet. St. Ct. Rec. 10.

Ms. McIntyre distributed her leaflets by standing in the doorway of the meeting room at the middle school and handing her leaflets to persons who entered. St. Ct. Rec. 10. Her son and his girlfriend distributed the leaflets in the school parking lot by placing them under automobile windshield wipers. *Id.*

The leaflets that were being distributed stated:[3]

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[2] All record references are either to the Ohio Supreme Court opinion below or to the document entitled "Record of Appellant" filed by Petitioner in the Ohio Supreme Court and referred to here as "St. Ct. Rec."

[3] The printed text of the leaflets is quoted accurately, however, due to different typeface and space limitations the format is not the same as the original leaflets. Reproductions of the original leaflets appear at pages A-38 and A-39 of the appendix.



VOTE NO

ISSUE 19 SCHOOL TAX LEVY

Last election Westerville Schools, asked us to vote yes for new buildings and expansions programs. We gave them what they asked. We knew there was crowded conditions and new growth in the district.

Now we find out there is a 4 million dollar deficit — WHY?

We are told the 3 middle schools must be split because of over-crowding, and yet we are told 3 schools are being closed — WHY?

A magnet school is not a full operating school, but a specials school.

Residents were asked to work on a 20 member commission to help formulate the new boundaries For 4 weeks they worked long and hard and came up with a very workable plan. Their plan was totally disregarded — WHY?

WASTE of tax payers dollars must be stopped. Our children's education and welfare must come first. WASTE CAN NO LONGER BE TOLERATED.

PLEASE VOTE NO

ISSUE 19

THANK YOU

CONCERNED PARENTS
AND
TAX PAYERS

J. Michael Hayfield, Assistant Superintendent of Elementary Education for the Westerville schools, saw Ms. McIntyre distributing the leaflets. He examined them and informed her

that her leaflets violated Ohio election laws because they did not contain her name and address. 67 Ohio St. 3d at 392.

On the next evening, April 28, 1988, a similar school meeting was held at the Walnut Springs Middle School. Petitioner again distributed leaflets opposing passage of the school tax levy to persons attending the meeting, *Id.*, and Assistant Superintendent Hayfield again informed her that her leaflets did not conform to campaign regulations because they did not contain her name and address. St. Ct. Rec. 10, 25.

Following her leafletting on April 27, 1988 and April 28, 1988, the school tax levy was defeated. It was also defeated in the next election. Finally, on the third try, it passed. 67 Ohio St. 3d at 398. Then, on April 6, 1989, after the tax increase was approved and almost one year after she had distributed her leaflets at the Westerville middle schools, she received a letter from the Ohio Elections Commission informing her that a complaint had been filed. St. Ct. Rec. 6. The complaint, filed by Assistant Superintendent Hayfield, charged her with violating R.C. § 3599.09 and two other statutes because she had distributed her leaflets at the middle schools without including her name.[4] St. Ct. Rec. 1.

Initially, the charges were dismissed for want of prosecution. St. Ct. Rec. 15. A short time later, however, they were reinstated at the request of Assistant Superintendent Hayfield. A hearing on the charges against petitioner was held on March 19, 1990. 67 Ohio St.3d at 392. At that time, petitioner appeared before the Ohio Elections Commission *pro se*. The Ohio Elections Commission found her to have violated R.C. § 3599.09 and dismissed the other charges. It imposed a fine of $100. *Id.*

On September 10, 1990, the Franklin County Court of Common Pleas reversed the finding of violation and the fine

[4] Ohio Revised Code §§ 3517.10(D) (failure to file a designation of treasurer) and 3517.13(E) (failure to file PAC report). Charges for violating these provisions were subsequently dismissed.



on grounds that § 3599.09 was unconstitutional as applied. App. A-33. On April 7, 1992, the Ohio Court of Appeals reversed, reinstating the finding of violation and the fine. App. A-16. On September 22, 1993, the Ohio Supreme Court affirmed, with Justice Craig Wright dissenting. App. A-1.

## REASONS FOR GRANTING THIS PETITION FOR CERTIORARI

The Ohio Supreme Court has erroneously upheld a statute flatly prohibiting the distribution of all anonymous political leaflets. It has approved the imposition of a permanent, unconstitutional burden on political speech that is at the core of the electoral process. *Buckley* v. *Valeo*, 424 U.S. 1, 14-15 (1976). In reaching its conclusion, the Ohio Supreme Court has rejected this Court's teaching in *Talley* v. *California*, 362 U.S. 60 (1960) that, "[a]nonymous pamphlets, leaflets, brochures, and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all." 362 U.S. at 64. Thus, the decision below raises extremely important First Amendment issues. It also contradicts the comparatively recent rulings of other courts.[5] As a consequence, this petition should be granted or, alternatively, the decision below should be summarily reversed.

### I. Ohio Revised Code section 3599.09 imposes a flat ban on distribution of anonymous political campaign leaflets. Such a ban is explicitly prohibited by the First Amendment and by this Court's decision in *Talley v. California.*

#### a. The statute is overbroad because it prohibits distribution of all anonymous political campaign leaflets.

The Ohio Elections Commission fined Petitioner McIntyre because she prepared and distributed anonymous political leaflets stating her opposition to passage of a school tax referendum. Thus, she is being punished for the communication of a classic, political viewpoint.

[5] The opinions are cited *infra* at page 20.



Indeed, Ohio's statute prohibiting distribution of anonymous communications covers virtually every form of written communication without regard to whether the communication is truthful or whether it inflicts any harm on the election process. The statute is therefore prohibited by *Talley* v. *California*, 362 U.S. 60 (1960), which holds that distribution of anonymous political leaflets is protected by the First Amendment. As this Court stated in *Talley*, the prohibition of such leafletting is unconstitutional because it "would tend to restrict freedom to distribute information and thereby freedom of expression." 362 U.S. at 64.

The defendant in *Talley* was arrested because he distributed an anonymous handbill urging a boycott of certain merchants who sold goods manufactured by companies that engaged in employment discrimination. The distributor was tried in the Los Angeles Municipal Court for violating an ordinance that prohibited the distribution of "any hand-bill in any place under any circumstances, which does not have printed on the cover, or the face thereof, the name and address of . . . (a) [t]he person who printed, wrote compiled or manufactured [it] . . . [and] (b) [t]he person who caused the [handbill] to be distributed." 362 U.S. at 60-61. The municipal court held that the failure of the leaflet to include the name of the distributor violated the ordinance. It then found the defendant guilty and fined him $10.

This Court reversed the conviction on grounds that the sweeping identification requirement imposed by Los Angeles placed an impermissible restriction on constitutionally protected political speech. According to the Court, leafletting is a time-honored mode of political advocacy.

Thus it stated:

> In *Lovell* v. *Griffin*, 303 U.S. 444 [(1938)], we held void on its face an ordinance that comprehensively forbade any distribution of literature at any time or place in Griffin, Georgia, without a license. Pamphlets and leaflets, it was pointed out, "have been

> historic weapons in the defense of liberty" and enforcement of the Griffin ordinance "would restore the system of license and censorship in its baldest form." *Id.* at 452.

362 U.S. at 62. The *Talley* decision concluded that an ordinance prohibiting the anonymous distribution of political protest leaflets is a form of censorship forbidden by the First Amendment. The Court explained:

> We have recently had occasion to hold in two cases that there are times and circumstances when States may not compel members of groups engaged in the dissemination of ideas to be publicly identified. *Bates* v. *Little Rock*, 361 U.S. 516 [(1960)]; *NAACP* v. *Alabama*, 357 U.S. 449, 462 [(1958)]. The reason for these holdings is that identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance. This broad Los Angeles ordinance is subject to the same infirmity.

362 U.S. at 65. The Ohio statute challenged in this case has the same constitutional infirmity condemned in *Talley*. It prohibits completely truthful leaflets simply because they are anonymous. It prohibits all such leaflets even though they are not fraudulent or misleading in any way. Moreover, the statute makes no distinction between leaflets that discuss ballot issues and leaflets that discuss candidates for public office.

In an attempt to distinguish *Talley*, the Ohio Supreme Court held that "unlike *Talley*, the [Ohio] disclosure requirement is clearly meant to 'identify those responsible for fraud, false advertising and libel.' " 67 Ohio St.3d at 394 (quoting *Talley*, 362 U.S. at 64). The purported distinction is unpersuasive for the simple but fundamental reason that nothing in the language of § 3599.09 limits its application to "fraud, false advertising and libel." On the contrary, § 3599.09 applies with equal force to truthful statements and statements of political opinion. The fact that petitioner has been ordered to



pay a fine of $100 simply for distributing a political leaflet advocating a vote against a local school tax levy evidences the unconstitutional sweep of § 3599.09.

If anything, the effort to justify § 3599.09 as a means to prevent fraud and libel only underlines its resemblance to the ordinance struck down in *Talley* where a similar argument was made and rejected. Writing for the majority in *Talley*, Justice Black wrote: "Counsel [for the City of Los Angeles] has urged that this ordinance is a way to identify those responsible for fraud, false advertisng and libel. Yet the ordinance is in no manner so limited, nor have we been referred to any legislative history indicating such a purpose." 362 U.S. at 64. The same is true of R.C. § 3599.09. It bars *all* anonymous leaflets that address voters in referenda and elections of candidates. There are no exceptions. Moreover, Ohio has other statutes specifically regulating false statements during elections. *See* R.C. §§ 3599.091(B) and 3599.092(B)(2). This was acknowledged in the dissent below. 67 Ohio St.3d at 400-401.

Even if there were a legislative history indicating that the purpose of the Ohio statute was to prevent "fraud, false advertising and libel", it would still be invalid. Ohio Revised Code § 3599.09 is being applied, in this case, exactly as it is drafted — to ban the distribution of a political leaflet that seeks to persuade voters to vote against a school tax levy. Thus, like the Los Angeles ordinance, § 3599.09 "is not limited to handbills whose content is 'obscene or offensive to public morals or that advocates unlawful conduct.' " 362 U.S. at 64 (quoting *Lovell* v. *Griffin*, 303 U.S. at 451). Indeed, § 3599.09 is so broad that it reaches all election-related leafletting in quintessential public forums. In addition to prohibiting anonymous leaflets urging a vote against a referendum issue, it also prohibits unsigned political placards on front lawns. It may even prohibit unsigned letters to the editors of newspapers

The Ohio Supreme Court's second attempt to distinguish *Talley* is equally unavailing. Specifically, the decision below

incorrectly states that *Talley* does not apply to statutes imposing disclosure requirements on leaflets addressing voters during elections. In order to support this position, the Ohio Supreme Court relies on *First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S 765 (1978), a case which upholds the First Amendment right of business corporations to make donations designed to persuade voters in referendum elections. The Ohio Supreme Court mistakenly contends that footnote 32 from *Bellotti* supports the constitutionality of § 3599.09 because it suggests, in dicta, that corporations that engage in political advertising may be subject to disclosure requirements in some circumstances:

> Corporate advertising, unlike some methods of participation in political campaigns, is likely to be highly visible. *Identification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected. See Buckley [v. Valeo]*, 424 U.S. [1], at 66-67, [96 S. Ct. 612, at 657-658, 46 L. Ed. 2d 659, at 714-715 (1976)]; *United States* v. *Harriss*, 347 U.S. 612, 625-626 [74 S. Ct. 808, 815-817, 98 L. Ed. 989, 1001] (1954). *In addition, we emphasized in Buckley the prophylactic effect of requiring that the source of communication be disclosed.* 424 U.S. at 67 [96 S. Ct. at 657, 46 L. Ed. 2d, at 715]. (Emphasis added [by the Ohio Sup. Ct.]) 435 U.S. at 792, 98 S. Ct. at 1424, 55 L. Ed. 2d at 728.

67 Ohio St.3d at 395.

The Ohio Supreme Court's reliance on the *Bellotti* footnote underscores the defects in its reasoning. As Justice Wright pointed out in his dissent below, the *Bellotti* approval of disclosure requirements is confined to election-related activities by corporations. The *Bellotti* court was careful to make clear that the power of the state to regulate election-related conduct of corporations posed questions that were distinct from the power to regulate election-related speech of



individuals. 67 Ohio St.3d 398-399 (quoting *Bellotti*, 435 U.S at 777-778). Indeed, the right of individuals to distribute leaflets in public places has little in common with the regulation of corporate activities during elections and referenda. *Austin* v. *Michigan State Chamber of Commerce*, 494 U.S. 652 (1990).

Moreover, the only election disclosure requirements applicable to individuals that the Court has upheld required disclosure of anonymous partisan campaign contributions. *Buckley* v. *Valeo*, 424 U.S. 1 (1976). Petitioner's conduct cannot be measured by *Buckley* or its progeny, because the petitioner in this case is a leafletter who seeks to spread her opinions by means of the printed word communicated through a hand-to-hand exchange. Her expression cannot be limited by decisions of the Court applicable to campaign financing.

### b. The Ohio Supreme Court did not require that section 3599.09 advance a compelling state interest.

In order for Ohio to justify its statute burdening the First Amemdment by prohibiting distribution of anonymous political leaflets, it must establish that the statute advances a compelling state interest. Indeed, this Court has repeatedly stated that if a state law burdens basic First Amendment rights, the law is invalid in the absence of a compelling state interest. *Talley* v. *California*, 362 U.S. at 66 (Harlan, J., concurring); *NAACP* v. *Alabama*, 357 U.S. 449, 463, 464 (1958); *Buckley* v. *Valeo*, 424 U.S. 1, 64 (1976).

Implicitly recognizing that § 3599.09 could not survive such scrutiny, the Ohio Supreme Court erroneously applied a lesser standard of review to § 3599.09 because it is an election statute. Rather than being governed by *Talley* v. *California* and other strict scrutiny cases, the decision below stated that petitioner's leafletting activities are governed by *Burdick* v. *Takushi*, 112 S. Ct. 2059 (1992) which upheld Hawaii's ban on write-in voting:

> *[T]o subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest, as the petitioner suggests, would tie the hands of States seeking to assure that elections are operated equitably and efficiently. . . .* Accordingly, *the mere fact that a State's system "creates barriers . . . tending to limit the field of candidates from which voters might choose . . . does not of itself compel close scrutiny."* *Bullock* v. *Carter*, 405 U.S. 134, 143 [92 S. Ct. 849, 856, 31 L. Ed. 2d 92, 100] (1972); *Anderson [v. Celebrezze]*, 460 U.S. 780, 788, [103 S. Ct. 1564, 1569-1579, 75 L. Ed. 2d 547, 557]; *McDonald* v. *Board of Elections Commr's of Chicago*, 394 U.S. 802 [89 S. Ct. 1404, 22 L. Ed. 2d 739] (1969).

67 Ohio St.3d at 395. (Emphasis in original.)

The Ohio Supreme Court is wrong. *Takushi* is not applicable to this case because § 3599.09 does not regulate the mechanics of voting. Instead, it regulates the content of political leaflets in public places because they seek to persuade voters. The correct governing constitutional standard is set out in *Talley* v. *California*, which states: "[O]ne who is rightfully on a street . . . carries with him there as elsewhere the constitutional right to express his views in an orderly fashion . . . by handbills and literature as well as by the spoken word." 362 U.S. at 63, (quoting *Jamison* v. *Texas*, 318 U.S. 413, 416 (1943)). As a consequence, Ohio's restriction on leafletting must be measured by strict First Amendment standards applicable to regulation of the content of speech in public places. The applicable standard was stated in Justice Harlan's concurring opinion in *Talley*: "[S]tate action impinging on free speech and association will not be sustained unless the governmental interest asserted to support such impingement is compelling." 362 U.S. at 66 (Harlan, J., concurring).

The applicability of the compelling state interest standard to this case is underscored by *Burson* v. *Freeman*, 112 S. Ct.



1846 (1992)[6] There, the Court used the compelling state interest test to measure the constitutionality of a Tennessee law that prohibited the solicitation of voters within 100 feet of a polling place. In the course of upholding the statute, the Court explained that "a facially content-based restriction on political speech in public forum . . . must be subjected to exacting scrutiny: The State must show that the 'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.' " 112 S. Ct. at 1851, (quoting *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)). The compelling state interest analysis employed by the Court in *Burson* is equally applicable to this case because, as was true in *Burson*, the statute at issue here governs distribution of constitutionally protected election-related leaflets and pamphlets in public places.

In an effort to justify § 3599.09, the Ohio Supreme Court also states that the statute is supported by the state's interest in providing information about a leafletter's identity. The defect in the Ohio Supreme Court's view that § 3599.09 assists in informing voters was explained by the New York court in *State of New York* v. *Duryea*, 76 Misc. 2d 948, 351 N.Y.S.2d 978, 996, *aff'd* 44 A.D.2d 663, 354 N.Y.S.2d 129 (1974), which invalidated a similar statute:

> Of course the identity of the source is helpful in evaluating ideas. But "the best test of truth is the power of the thought to get itself accepted in the competition of the market." (*Abrams* v. *United States*, 250 U.S. 616 (1919) (Holmes, J.) Don't underestimate the common man. People are intelligent enough to evaluate the scource of an anonymous writing. They can see it is anonymous. They can evaluate its

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[6] It should be noted that *Burson*, which employed a compelling state interest test in an election context was decided in the same term as *Burdick* v. *Takusi*, *supra*, the case relied on by the court below.

> anonymity along with its message, as long as they are permitted, as they must be, to read that message. And then, once they have done so, it is for them to decide what is "responsible," what is valuable, and what is truth.

*See also Mills* v. *Alabama*, 384 U.S. 214 (1966) (invalidating an Alabama statute prohibiting election day editorials urging readers to vote a particular way).

The presence or absence of petitioner's name on her leaflets has nothing to say about the value of the ideas the leaflets advocate. Moreover, allowing people to evaluate anonymous writings for themselves is particularly appropriate in the context of petitioner's distribution of leafets directed at the merits of a non-partisan referendum. Since the leaflets address the merits of the referendum, neither the leaflets nor the leafletter is in a position to mislead voters about a candidate or to encourage political misconduct by elected officials. Thus, "there is no significant state or public interest in curtailing debate and discussion of a ballot measure." *Citizens Against Rent Control/Coalition for Fair Housing* v. *City of Berkeley*, 454 U.S. 290, 299 (1981).

The principal reason that compelled disclosure has never been a valid way to restrict anonymous political leafletting is that anonymous leafletting has long been regarded as a means to protect speakers against government retaliation. According to this Court in *Talley*:

> Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all. The obnoxious press licensing law of England, which was also enforced on the Colonies was due in part to the knowledge that exposure of the names of printers, writers and distributors would lessen the circulation of literature critical of the government. The



> old seditious libel cases in England show the lengths to which government had to go to find out who was responsible for books that were obnoxious to the rulers.

362 U.S. at 64-65.

In fact, there is evidence in the record of this case that school officials are using § 3599.09 as a means to punish the petitioner for her opposition to tax levies designed to raise money for the Westerville public schools. According to Ohio Supreme Court Justice Craig Wright's dissenting opinion:

> Indeed, in this case, it is possible that the very filing of the charge against McIntyre was in some measure in retaliation for her opposition to the school levy. Certainly, the timing of filing is suspect. McIntyre distributed the leaflets in April 1988, but the complaint was not filed until one year later. According to McIntyre, in the intervening period the school levy had been defeated twice but succeeded on the third attempt shortly prior to the filing of the complaint. It would appear that as soon as the levy was safely passed, the school district, in the person of the assistant superintendent of elementary education, sought retribution against McIntyre for her opposition. If the reasons espoused by the majority as justification for the constitutionality of the statute, i.e., educating the electorate and prevention of fraud in elections, were to be furthered, the charge should have been filed at the time of the purported offense, not one year and three elections later.

67 Ohio St.3d at 398, (Wright, J., dissenting).

In short, the decision below is more than wrong; it undermines our system of free expression and our national commitment to "robust debate." *New York Times* v. *Sullivan*, 376 U.S. 254, 270 (1964).

## II. Ohio Revised Code section 3599.09 is unconstitutional as applied to punish distribution of anonymous leaflets that advocate defeat of a school tax referendum.

No matter how § 3599.09 is interpreted by the Ohio courts, petitioner cannot be punished for distributing leaflets urging voters to vote against a ballot issue. This is true, even assuming the accuracy of the Ohio court's conclusion that § 3599.09 is facially constitutional because it has "as its purpose the identification of persons who distribute materials containing false statements." 67 Ohio St.3d at 394. The unconstitutional application lies in the fact that there is no evidence or allegation that petitioner's leaflets contained any libelous or misleading statements of fact. On the contrary, the record is clear that petitioner's leafletting was classic political advocacy.

Under the First Amendment, no one can be punished simply for handing out an anonymous leaflet communicating an opinion that voters should vote against a tax increase. Such opinions cannot be measured by a "true or false" standard in the way that statements of fact about people can be. A leaflet containing an opinion about a ballot issue cannot contain the kind of false statement that the Ohio Supreme Court says is subject to regulation under § 3599.09. As this Court said in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), "under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Id.* at 339-340. Similarly, *Milkovich* v. *Lorain Journal Co.*, 497 U.S. 1 (1990) holds that statements of fact on matters of public concern must be proved false before they are subject to the sanction of a defamation award.

The teachings of *Gertz* and *Milkovich* are particularly appropriate in this case because petitioner's leaflet was directed against a ballot issue rather than a candidate. While it may be possible to libel a candidate for public office, it is impossible to libel a referendum issue. In the period immediately



preceding an election, candidates might be vulnerable to malicious falsehoods about their private and professional lives. In contrast, no such vulnerability exists for a referendum on a school tax levy. Arguments favoring a ballot issue can be met with arguments opposing it. Such is the give and take in the marketplace of ideas.

The distinction between a referendum and an election for public office was made clear in *Citizens Against Rent Control/Coalition for Fair Housing* v. *Berkeley*, 454 U.S. 290 (1981). In that case, this Court invalidated an ordinance imposing a $250 limit on personal contributions to committees formed to support or oppose ballot measures. Chief Justice Burger's opinion found the contribution limit to be an unconstitutional interference with rights of association and individual and collective rights of expression. He made clear that contribution limits were designed to protect candidates against corruption and undue influence. *Id.* at 297. He also made clear that "the risk of corruption perceived in cases involving candidate elections is simply not present in a popular vote on a public issue." *Id.* at 298.

The Ohio Supreme Court's application of § 3599.09 to Petitioner McIntyre's leafletting fails to recognize the existence of any distinction between candidate elections and referendum elections. According to the Ohio court, Ms. McIntyre is obligated to put her name and address on any leaflet containing any advocacy related to an election. In reaching this conclusion, the state court exceeds its constitutional authority by ignoring the distinction between candidate elections and referenda on public issues.

## III. The decision of the Ohio Supreme Court conflicts with decisions by courts in several other states.

It is important for this Court to review the Ohio Supreme Court's opinion in this case in order to clarify the First Amendment principles applicable to § 3599.09. The Ohio Supreme Court's opinion in this case, refusing to follow

*Talley* v. *California*, is generating a serious conflict of legal authority. Since this Court's decision in *Talley*, courts considering similar statutes in at least eight other states have relied on *Talley* to find such statutes to be unconstitutional. *Wilson* v. *Stocker*, 819 F.2d 943 (10th Cir. 1987); *Illinois* v. *White*, 116 Ill. 2d 171, 506 N.E.2d 1284 (1987); *Schuster* v. *Imperial County Municipal Court*, 109 Cal. App. 3d 887, 167 Cal. Rptr. 447 (1980), *cert. denied* 450 U.S. 1042 (1981); *State of North Dakota* v. *North Dakota Education Association*, 262 N.W.2d 731 (1978); *State of Louisiana* v. *Fulton*, 337 So. 2d 866 (1976); *Commonwealth of Massachusetts* v. *Dennis*, 368 Mass. 92, 329 N.E.2d 706 (1975); *State of New York* v. *Duryea*, 76 Misc. 2d 948, 351 N.Y.S.2d 978 (1974); *State of Idaho* v. *Barney*, 92 Idaho 581, 448 P.2d 195 (1968).

In contrast, prior to this case, only *Morefield* v. *More*, 540 S.W.2d 873 (Ky. 1976) and *United States* v. *Insco*, 365 F. Supp. 1308 (M.D. Fla. 1973) had cited *Talley* and refused to afford constitutional protection to anonymous speech. The Ohio Supreme Court is now the third case that cites *Talley* in the course of denying First Amendment protection to anonymous speech.

Presently, a great many states have statutes similar to § 3599.09.[7] There has been only periodic enforcement of

[7] They include Ala. Code §§ 17-22A-12, 17-22A-13 (1992); Alaska Stat. § 15.56.010 (1992); Ark. Code Ann. § 7-1-103 (Michie 1992); Colo. Rev. Stat. § 1-13-108 (1992); Conn. Gen. Stat. § 9-333w (1990) (Michie 1992); Idaho Code § 67-6614A (1992); Ind. Code Ann. § 3-14-1-3 (Burns 1992); Iowa Code § 56.14 (1991); Md. Ann. Code art. 33, § 26-17 (1992); Mass. Ann. Laws ch. 56, § 41 (Law. Co-op. 1992); Minn. Stat. § 211B.04 (1992); Miss. Code Ann. § 23-15-899 (1991); Mon. Code Ann. § 13-35-225 (1992); Neb. Rev. Stat. § 49-1474.01 (Supp. 1992); Nev. Rev. Stat. Ann. § 294A.320 (Michie 1991); N.H. Rev. Stat. Ann. § 665:14 (1991); N.J. Rev. Stat. § 19:34-38.1 (1992); N.M. Stat. Ann. §§ 1-19-16, 1-19-17 (Michie 1992); Or. Rev. Stat. § 260.522 (1991); R.I. Gen. Laws § 17-23-1 (1991); S.D. Codified Laws Ann. § 12-25-4.1 (1992); Tenn. Code Ann. § 2-19-120 (1992); Va. Code Ann. § 24.1-277 (Michie 1992); W. Va. Code § 3-8-12 (1992); Wis. Stat. § 11.30 (1989-1990); Wyo. Stat. § 22-25-110 (1992).



these statutes. It would appear that most states are deferring to this Court's holdings protecting anonymous leafletting. If the Ohio Supreme Court decision is allowed to stand, it will serve as a forceful invitation to the states to enforce such laws. Thus, when public officials are confronted by opponents distributing anonymous leaflets, the officials will have a new weapon to censor core political advocacy. This is exactly the burden on free speech that the First Amendment was designed to prevent.

## CONCLUSION

A statute prohibiting the distribution of anonymous leaflets that address ballot issues violates the First Amendment. In upholding such a statute, the Ohio Supreme Court has declined to accede to the precedent set by *Talley* v. *California* and the cases that follow it. Petitioner therefore requests that this Court grant her petition for certiorari or summarily reverse the ruling of the court below.

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# APPENDIX

McINTYRE, APPELLANT, *v.* OHIO ELECTIONS COMMISSION, APPELLEE.

67 Ohio St.3d 391

The requirement of R.C. 3599.09 that persons responsible for the production of campaign literature pertaining to the adoption or defeat of a ballot issue identify themselves as the source thereof is not violative of the right to free speech guaranteed by the First Amendment to the United States Constitution and Section 11, Article I of the Ohio Constitution.

(No. 92-1147—Submitted June 1, 1993—Decided September 22, 1993.)

APPEAL from the Court of Appeals for Franklin County, No. 90AP-1221.

On April 27, 1988, appellant, Margaret McIntyre, distributed flyers at Blendon Middle School in Westerville, Ohio, to attendees of a meeting held to discuss the Westerville school levy. The levy had been placed on the May 3, 1988 primary election ballot. Similar flyers were deposited upon the windshields of automobiles in the school parking lot by a relative of appellant and by another person. The leaflets generally expressed opposition by appellant to the school levy. Some of the flyers failed to include the name and address of appellant as the person who produced them. Appellant was apprised of the nonconformity of this campaign literature by J. Michael Hayfield, Assistant Superintendent of Elementary Education for the Westerville City School District. Nevertheless, on April 28, 1988, appellant distributed similar leaflets outside the Walnut Springs Middle School in Westerville.

On March 30, 1989, a complaint against appellant was filed with appellee, Ohio Elections Commission ("OEC"),

charging her, *inter alia*, with violations of R.C. 3599.09 —distribution of campaign literature without a proper disclaimer. On March 19, 1990, a hearing was held before the OEC. On March 30, 1990, appellee issued its decision finding appellant in violation of R.C. 3599.09, and fining her $100. On April 6, 1990, appellant instituted an appeal to the Franklin County Common Pleas Court. On October 2, 1990, the common pleas court reversed the decision of appellee, concluding that R.C. 3599.09 was unconstitutional as applied. On April 7, 1992, the Tenth District Court of Appeals reversed the trial court.

The cause is now before this court pursuant to the allowance of a motion to certify the record.

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*George Q. Vaile*, for appellant.

*Lee I. Fisher*, Attorney General, *Robert A. Zimmerman* and *Patrick A. Devine*, Assistant Attorneys General, for appellee.

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A. WILLIAM SWEENEY, J. The present action involves the constitutionality of R.C. 3599.09 insofar as it requires the identification of the author of campaign literature. In this regard, R.C. 3599.09 provides in relevant part:

"(A) *No person shall write, print, post, or distribute*, or cause to be written, printed, posted, or distributed, *a notice*, placard, dodger, advertisement, sample ballot, *or any other form of general publication which is designed* to promote the nomination or election or defeat of a candidate, or *to promote the adoption or defeat of any issue*, or to influence the voters in any election, or make an expenditure for the purpose of financing political communication through newspapers, magazines, outdoor advertising facilities, direct mailings, or other similar types of general public political advertising, or through flyers, handbills, or other nonperiodical printed matter, *unless there appears on such form of publication in a conspicuous place or is contained within said statement the name*



*and residence or business address of* the chairman, treasurer, or secretary of the organization issuing the same, or *the person who issues, makes, or is responsible therefor.* * * * This section does not apply to the transmittal of personal correspondence that is not reproduced by machine for general distribution." (Emphasis added.)

It is the contention of appellant that the aforementioned restriction violates her right to free speech under Section 11, Article I of the Ohio Constitution, which provides in part:

"Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press."

In reversing the common pleas court, the court of appeals relied upon the holding of this court in *State v. Babst* (1922), 104 Ohio St. 167, 135 N.E. 525. The syllabus thereto provides:

"Section 13343-1, General Code, appearing in Part Four, Title I, Chapter 18, entitled 'Offenses Relating To Elections,' in its operation does not restrain or abridge the liberty of speech as guaranteed by Section 11, Article I, Bill of Rights, but is regulatory in nature, and intended to prevent abuse of the right."

G.C. 13343-1 is the predecessor to R.C. 3599.09 and does not differ from it to any material extent. Nevertheless, appellant questions the continued vitality of *Babst* in light of subsequent decisions by the United States Supreme Court interpreting the First Amendment to the United States Constitution. In particular, appellant relies upon *Talley* v. *California* (1960), 362 U.S. 60, 80 S.Ct. 536, 4 L.Ed.2d 559. In *Talley*, the court invalidated a city ordinance on the basis that its requirement that handbills contain the name and address of the person producing them was an unconstitutional infringement on the right to free speech. The handbills had as their purpose the organization of a consumer boycott of particular merchants who allegedly practiced racial discrimination. In concluding that the identification of the author of the

handbill would run afoul of the First Amendment, the *Talley* court remarked:

"There can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression. 'Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.' *Lovell* v. *Griffin*, 303 U.S., at [444,] 452 [58 S.Ct. 666, 669, 82 L.Ed. 949, 954 (1938)].

"Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all. The obnoxious press licensing law of England, which was also enforced on the Colonies was due in part to the knowledge that exposure of the names of printers, writers and distributors would lessen the circulation of literature critical of the government. The old seditious libel cases in England show the lengths to which government had to go to find out who was responsible for books that were obnoxious to the rulers. John Lilburne was whipped, pilloried and fined for refusing to answer questions designed to get evidence to convict him or someone else for the secret distribution of books in England. Two Puritan Ministers, John Penry and John Udal, were sentenced to death on charges that they were responsible for writing, printing or publishing books. Before the Revolutionary War colonial patriots frequently had to conceal their authorship or distribution of literature that easily could have brought down on them prosecutions by English-controlled courts. Along about that time the Letters of Junius were written and the identity of their author is unknown to this day. Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names. It is plain that anonymity has sometimes been assumed for the most constructive purposes." (Footnotes omitted.) 362 U.S. at 64-65, 80 S.Ct. at 538-539, 4 L.Ed.2d at 563.



However, the ordinance at issue in *Talley* apparently had as its only purpose the identification of the author of the handbills. Thus, in distinguishing the ordinance from other provisions which sought to prevent the dissemination of falsehoods, the court remarked:

"Counsel has urged that this ordinance is aimed at providing a way to identify those responsible for fraud, false advertising and libel. Yet the ordinance is in no manner so limited, nor have we been referred to any legislative history indicating such a purpose. *Therefore we do not pass on the validity of an ordinance limited to prevent these or any other supposed evils.* This ordinance simply bars all handbills under all circumstances anywhere that do not have the names and addresses printed on them in the place the ordinance requires." (Emphasis added.) 362 U.S. at 64, 80 S.Ct. at 538, 4 L.Ed.2d at 562-563.

In contrast to the ordinance at issue in *Talley*, appellee can legitimately claim that R.C. 3599.09 has as its purpose the identification of persons who distribute materials containing false statements. R.C. 3599.091(B) and 3599.092(B)(2) prohibit persons from making false statements during campaigns for public office and ballot issues, respectively. Accordingly, unlike *Talley*, the disclosure requirement is clearly meant to "identify those responsible for fraud, false advertising and libel." Moreover, in *First Natl. Bank of Boston* v. *Bellotti* (1978), 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707, the United States Supreme Court, while concluding that a state statute prohibiting corporate expenditures opposing or supporting ballot issues was violative of the First Amendment, nevertheless acknowledged that requirements such as the one at issue in the case herein were permissible. In rejecting the argument of the state that restrictions on corporate speech were necessary in order to allow alternative voices to be heard, the court remarked as follows:

"Moreover, the people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. [Footnote omitted.] They

may consider, in making their judgment the source and credibility of the advocate. [Court's footnote 32.]" 435 U.S. at 791-792, 98 S.Ct. at 1423-1424, 55 L.Ed.2d at 727-728.

The court's footnote 32 states:

"Corporate advertising, unlike some methods of participation in political campaigns, is likely to be highly visible. *Identification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected.* See *Buckley [*v. *Valeo]*, 424 U.S. [1], at 66-67 [96 S.Ct. 612, at 657-658, 46 L.Ed.2d 659, at 714-715 (1976)]; *United States* v. *Harriss*, 347 U.S. 612, 625-626 [74 S.Ct. 808, 815-817, 98 L.Ed. 989, 1001] (1954). *In addition, we emphasized in Buckley the prophylactic effect of requiring that the source of communication be disclosed.* 424 U.S., at 67 [96 S.Ct., at 657, 46 L.Ed.2d, at 715]." (Emphasis added.) 435 U.S. at 792, 98 S.Ct. at 1424, 55 L.Ed.2d at 728.

Significantly, the court made this observation in a case where it also stated that a governmental entity was required to demonstrate a compelling interest to justify a restriction on First Amendment rights. However, in *Burdick* v. *Takushi* (1992), 504 U.S. ____, 112 S.Ct. 2059, 119 L.Ed.2d 245, the court, in upholding the ban on write-in voting instituted by the state of Hawaii, recognized a different standard. The court observed as follows:

"Election laws will invariably impose some burden upon individual voters. Each provision of a code, 'whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual's right to vote and his right to association with others for political ends.' *Anderson* v. *Celebrezze*, 460 U.S. 780, 788 [103 S.Ct. 1564, 1569-1570, 75 L.Ed.2d 547, 557] (1983). Consequently, *to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest*, as petitioner suggests, *would tie the hands of States seeking to assure that elections are operated equitably and efficiently.* See Brief for



Petitioner 32-37. Accordingly, *the mere fact that a State's system 'creates barriers . . . tending to limit the field of candidates from which voters might choose . . . does not of itself compel close scrutiny.' Bullock* v. *Carter*, 405 U.S. 134, 143 [92 S.Ct. 849, 856, 31 L.Ed.2d 92, 100] (1972); *Anderson, supra*, 460 U.S., at 788 [103 S.Ct., at 1569-1570, 75 L.Ed.2d, at 557]; *McDonald* v. *Board of Election Comm'nrs of Chicago*, 394 U.S. 802 [89 S.Ct. 1404, 22 L.Ed.2d 739] (1969).

"Instead, as the full Court agreed in *Anderson, supra*, 460 U.S., at 788-789 [103 S.Ct., at 1569-1570, 75 L.Ed.2d, at 557-558]; *id.*, at 808, 817 [103 S.Ct., at 1580, 1584-1585, 75 L.Ed.2d, at 576] (REHNQUIST, J., dissenting), a more flexible standard applies. *A court considering a challenge to a state election law must weight 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.' Id.*, at 789 [103 S.Ct., at 1570, 75 L.Ed.2d, at 558]; *Tashjian [v. Republican Party of Conn.], supra*, 479 U.S. [208], at 213-214 [107 S.Ct. [544], at 547-548, 93 L.Ed.2d 514, at 523 (1986)].

"*Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights.* Thus, as we have recognized when those rights are subjected to 'severe' restrictions the regulation must be 'narrowly drawn to advance a state interest of compelling importance.' *Norman* v. *Reed*, 502 U.S. ____, ____ [112 S.Ct. 698, 705, 116 L.Ed.2d 711, 723] (1992). But *when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions. Anderson, supra*, 460 U.S., at 788 [103 S.Ct., at 1569-1570, 75 L.Ed.2d, at 557]; see also *id.*, at 788-789, n. 9 [103 S.Ct.,

at 1569-1579, 75 L.Ed.2d at 557-558]." (Emphasis added.) 504 U.S. at ____, 112 S.Ct. at 2063-2064, 119 L.Ed.2d at 253-254.

The minor requirement imposed by R.C. 3599.09 that those persons producing campaign literature identify themselves as the source thereof neither impacts the content of their message nor significantly burdens their ability to have it disseminated. This burden is more than counterbalanced by the state interest in providing the voters to whom the message is directed with a mechanism by which they may better evaluate its validity. Moreover, the law serves to identify those who engage in fraud, libel or false advertising. Not only are such interests sufficient to overcome the minor burden placed upon such persons, these interests were specifically acknowledged in *Bellotti* to be regulations of the sort which would survive constitutional scrutiny.

We therefore conclude that the requirement of R.C. 3599.09 that persons responsible for the production of campaign literature pertaining to the adoption or defeat of a ballot issue identify themselves as the source thereof is not violative of the right to free speech guaranteed by the First Amendment to the United States Constitution and Section 11, Article I of the Ohio Constitution.

Accordingly, the judgment of the court of appeals is affirmed.

*Judgment affirmed.*

MOYER, C.J., DOUGLAS, RESNICK, F.E. SWEENEY and PFEIFER, JJ., concur.

WRIGHT, J., dissents.

WRIGHT, J., dissenting. I must dissent because I do not agree with the majority that R.C. 3599.09(A) imposes a "minor requirement" that "persons producing campaign literature identify themselves as the source thereof," nor do I agree that this requirement "neither impacts the content of



their message nor significantly burdens their ability to have it disseminated." I am sure that Publius and Cato would have strenuously disagreed with the majority as well.

The most important ballot issue in the history of this country was the political campaign concerning ratification of the United States Constitution. One of the longest and most energetic campaigns occurred in New York. Both positions, for and against ratification, were vigorously debated. "Cato," believed to be New York Governor George Clinton, expressed the position of the opponents of ratification of the Constitution, the antifederalists. "Publius," a pseudonym used by Alexander Hamilton, John Jay and James Madison, expressed the position of the supporters of ratification of the Constitution, the federalists. "Many commentaries on the constitution were written under pseudonyms, both to protect the author and to make full use of available symbols. Heroes of the Roman Republic were popular choices, because many were well-known symbols of republicanism." Roots of the Republic: American Founding Documents Interpreted (Schechter Ed. 1990) 293. Preeminent among the commentaries was The Federalist, the essays written by Hamilton, Jay and Madison under the pseudonym of Publius. Historians argue that a complete understanding of the purpose of The Federalist requires that it be seen as three documents in one. *"It is a campign document designed to win popular approval among the voters of New York State for the proposed Constitution;* a serious work of political thought, analyzing the nature of free societies; and the authoritative commentary on the Constitution, reflecting the intent of the Framers of the Constitution." (Emphasis added.) *Id.* at 291. I think that James Madison, the author of the Bill of Rights, would be very surprised by the decision of the majority that a citizen does not have the right to issue anonymous statements expressing her views on ballot issues.

Nor does the United States Supreme Court agree with the statement of the majority that disclosure requirements do not burden the ability to disseminate expressions of political views. That court has said that *"[t]here can be no doubt* that

such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression." (Emphasis added.) *Talley* v. *California* (1960), 362 U.S. 60, 64, 80 S.Ct. 536, 538, 4 L.Ed.2d 559, 563. The court was concerned that compelled disclosure can chill the exercise of free expression by persons who hold unpopular views and who may fear reprisal for their views.

I believe that the majority minimizes the effect this statute has on the ability of individual citizens to freely express their views in writing on political issues. Many ballot issues, even ones of purely local interest, are controversial. School levies and other tax issues, and zoning issues all can generate strong opinions about their merits. Indeed, in this case, it is possible that the very filing of the charge against McIntyre was in some measure in retaliation for her opposition to the school levy. Certainly, the timing of the filing is suspect. McIntyre distributed the leaflets in April 1988, but the complaint was not filed unitl one year later. According to McIntyre, in the intervening period the school levy had been defeated twice but succeeded on the third attempt shortly prior to the filing of the complaint. It would appear that as soon as the levy was safely passed, the school district, in the person of the assistant superintendent of elementary education, sought retribution against McIntyre for her opposition. If the reasons espoused by the majority as justification for the constitutionality of the statute, *i.e.*, educating the electorate and prevention of fraud in elections, were to be furthered, the charge should have been filed at the time of the purported offense, not one year and three elections later.

Since disclosure requirements can significantly burden freedom of expression, it remains for us to determine whether they are constitutional because of an overriding state interest. The majority traces a line of United States Supreme Court decisions to give the impression that the United States Supreme Court has implicitly ruled that disclosure requirements are constitutional and that the test to be applied is not a strict scrutiny test, in which the state must show a compelling state interest, but a lesser test satisfied merely by



showing a legitimate state interest. Such is not the case. The error the majority makes is failing to distinguish the nature of the disclosure requirement (whether disclosure involves authorship of campaign literature, disclosure of contributions or expenditures) and the parties who are subject to the disclosure requirement (individuals, candidates, and/or organizations). R.C. 3599.09(A) requires disclosure of authorship of political opinions and applies to a wide range of disseminators of those political opinions, including individual citizens, candidates, political committees, political parties, for-profit corporations and non-profit corporations.

The United States Supreme Court has recognized such distinctions when considering the validity of election laws. The court has indicated that restrictions which may be constitutionally valid against organizations may not be valid against individuals. For example, in the case of *First Natl. Bank of Boston* v. *Bellotti* (1978), 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707, cited by the majority, in which the court declared unconstitutional a state ban against corporate expenditures for the purpose of influencing votes on referenda issues, the court stated: "Nor is there any occasion to consider in this case whether, under different circumstances, a justification for a restriction on speech that would be inadequate [*i.e.*, unconstitutional] as applied to individuals might suffice to sustain the same restriction as applied to corporations, unions or like entities." *Id.* at 777-778, 98 S.Ct. at 1416, 55 L.Ed.2d at 718, fn. 13. The Supreme Court has sustained ceilings on political contributions but held invalid limitations on independent expenditures by individuals and groups. *Buckley* v. *Valeo* (1976), 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659. In addition, the court has recognized a distinction between for-profit corporations' contributions concerning referenda issues and such contributions for candidates. *Bellotti*, *supra*, at 788, 98 S.Ct. at 1422, 55 L.Ed.2d at 725, fn. 26.

These distinctions must be kept in mind when considering the majority's reliance on the Supreme Court's *dicta* in footnote 32 in *Bellotti*, which the majority construes to mean that

disclosure requirements are constitutional. Placed in the proper context, it is apparent that the *Bellotti* court's comments are limited to the facts of *Bellotti* (corporate expenditures), as the court expressly refers to disclosure requirements for "corporate advertising." *Bellotti, supra,* at 792, 98 S.Ct. at 1424, 55 L.Ed.2d at 728, fn. 32.

The case before us involves a challenge to R.C. 3599.09 as applied to an individual citizen, not a citizen who is a candidate, nor a political committee, a political party or a corporation. What is the proper test to be applied to determine whether the state has an interest sufficient to justify the restraint on a citizen's right of expression created by a disclosure requirement? The majority is correct that the United States Supreme Court has held that not every state election law must be subject to strict scrutiny. See *Anderson* v. *Celebrezze* (1983), 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547, and *Burdick* v. *Takuski* (1992), 504 U.S. ____, 112 S.Ct. 2059, 119 L.Ed.2d 245. However the court has ruled that *disclosure requirements* do necessitate a strict scrutiny analysis: "We have repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment * * *. We long have recognized that significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest. Since *NAACP* v. *Alabama* [*ex rel. Patterson* (1958), 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488] we have required that the subordinating interest of the State must survive exacting scrutiny." (Citations omitted.) *Buckley* v. *Valeo* (1976), 424 U.S. 1, 64, 96 S.Ct. 612, 656, 46 L.Ed.2d 659, 713. In the present case, the majority errs in applying the lesser standard of a showing of merely a legitimate state interest.

Has the Ohio Elections Commission shown a compelling, not merely legitimate, interest in requiring the disclosure of the name and address of a citizen who distributes a pamphlet on a referendum issue? The majority finds two state interests which are served by this requirement. First, "providing the



voters to whom the message is directed with a mechanism by which they may better evaluate its validity," and, second, "the law serves to identify those who engage in fraud, libel or false advertising." With regard to the interest in educating the electorate, the majority appears to underestimate the electorate by suggesting that they are as moved by who supports a position as by the actual substance of the position. A corollary to this proposition is that anonymity oftentimes forces one to think about the substance of the argument as opposed to focusing on the messenger. In any event, I do not believe that the incremental value in education which is gained in knowing the name of an individual who advocates a position is a sufficiently compelling interest to justify the restraint on freedom of expression.

I recognize the state's interest in assuring that information disseminated about candidates and issues is not fraudulent, false or libelous. Indeed, as an elected official, I am most sympathetic and supportive of this goal. Anyone in public office shares the concern that he or she not be subjected to false accusations. However, under the strict scrutiny test, the statute must be narrowly tailored to further the state's compelling interest. The most direct way to further this interest is to proscribe the dissemination of false, fraudulent or libelous information. This the state has done in R.C. 3599.091(B) and 3599.092(B)(2). One commentator has suggested a way in which a state may narrowly tailor a disclosure requirement so that the statute bears a more direct relationship to furtherance of the state's interest:

"* * * [A] state might choose to limit disclosure requirements to advertisements in newspapers, major periodicals, and the broadcast media. These media have the widest circulation and, arguably, the greatest impact on voters. * * *" Note, Developments in the Law, Elections (1975), 88 Harv.L.Rev. 1111, 1292, fn. 323. R.C. 2599.09(B) is directed at these types of communications.

Removing the requirement that an individual citizen place his or her name and residence address on leaflets does not prevent the state from pursuing the goal of preventing the

dissemination of false information. A person who disseminates false information can be charged with such a violation whether or not his or her name is on the literature. Admittedly it will require additional investigation to determine the source of such a publication. However, the present case clearly shows that the omission of a name on a leaflet does not prevent discovery of the author. Indeed, the identity of the author will *always* be known in order to file a charge alleging violation of R.C. 3599.09(A). If the author has disseminated false, fraudulent or libelous information, the proper course to further the state's interest is to charge the person with a violation of R.C. 3599.091(B) or 3599.092(B)(2), not to charge the person with a violation of R.C. 3599.09(A). Since removing the disclosure requirement for individual citizens will not prevent the state from accomplishing its goal, while disclosure, at best, will merely assist it, I do not find the state's interest has been furthered in the way which is least restrictive of freedom of expression.

I find it notable that each of the judges below who reviewed this case was seriously troubled by the potential unconstitutionality of the statute as applied to McIntyre. The trial court ruled that the statute was unconstitutional as applied to McIntyre. Judge Whiteside agreed with the trial court. Even the majority opinion of the court of appeals, overruling the trial court, expressed serious concern for the constitutionality of the statute as applied to McIntyre, but felt compelled to follow the precedent of this court in *State* v. *Babst* (1922), 104 Ohio St. 167, 135 N.E. 525. The court noted, "[i]n the final analysis, while *Babst* presents obvious deficiencies, the syllabus thereof is so broad that we continue to feel bound thereby; and, if R.C. 3599.09(A) be constitutional on its face as *Babst* decided, we are unable to conclude that it is unconstitutional as applied to [McIntyre] herein. Nonetheless, given the more recent United States Supreme Court cases, this case presents a substantial issue for further analysis by the Supreme Court."

The "obvious deficiencies" in *Babst*, referred to by the appellate court, are that it "contains no discussion of whether



the state interest in prohibiting anonymous political communications was sufficiently compelling to warrant the abridgement of free speech imposed by G.C. 13343-1 and, if so, whether the statute therein was narrowly tailored to serve that compelling state interest." When these questions are answered, particularly in light of *Talley*, I believe the appropriate conclusion is that R.C. 3599.09(A) is not narrowly tailored to serve a compelling state interest and is, therefore, unconstitutional as applied to McIntyre.

For the foregoing reasons, I respectfully dissent.

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

No. 90AP-1221
(REGULAR CALENDAR)

Margaret McIntyre,
Appellant-Appellee,

v.

Ohio Elections Commission,
Appellee-Appellant.

**OPINION**
Rendered on April 7, 1992

MR. GEORGE Q. VAILE, for appellee.

MR. LEE FISHER, Attorney General, and MR. PATRICK A. DEVINE, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, J.

Appellant, the Ohio Elections Commission ("commission"), appeals from a judgment of the Franklin County Court of Common Pleas reversing the commission's determination that appellee, Margaret McIntyre, violated R.C. 3599.09.

James Michael Hayfield, Assistant Superintendent of Elementary Education of the Westerville City School District, filed a complaint and affidavit with the commission, alleging that he observed appellee distribute a publication relating to a Westerville City Schools tax levy at Blendon Middle School on April 27, 1988; and that such publication did not contain the name and address of the person responsible therefor.



After a hearing on the merits of the foregoing complaint, the commission determined that appellee violated R.C. 3599.09 and imposed a fine of $100 upon appellee. Pursuant to R.C. 119.12, appellee appealed to the common pleas court, which found that the commission's decision was not supported by the record and represented an unconstitutional application of R.C. 3599.09.

Appellant appeals therefrom, assigning the following errors:

> "I. THE LOWER COURT COMMITTED ERROR IN REVERSING THE DECISION OF THE OHIO ELECTIONS COMMISSION ON THE BASIS THE DECISION IS NOT SUPPORTED BY THE RECORD.
>
> "II. THE LOWER COURT COMMITTED ERROR IN REVERSING THE DECISION OF THE OHIO ELECTIONS COMMISSION ON THE BASIS THAT R.C. 3599.09 IS UNCONSTITUTIONAL AS APPLIED TO MARGARET McINTYRE'S ACTIVITIES."

Appellee filed no notice of appeal, but nevertheless assigns the following error:

> "The court below ruled improperly when it failed to find that ORC 3599.09 is overbroad and unconstitutional on its face in that it infringes First Amendment protected speech of individual citizens of the state and nation."

Appellee having filed no notice of appeal, we will consider her assignment of error only to the extent necessary to prevent a reversal of the common pleas court's judgment. R.C. 2505.22.

Appellant's first assignment of error asserts that the common pleas court erred in determining that the commission's decision was not supported by the record.

R.C. 3599.09(A) provides as follows:

> "No person shall write, print, post, or distribute, or cause to be written, printed, posted, or distributed, a notice, placard, dodger, advertisement, sample ballot, or any other form of general publication which is designed * * * to promote the adoption or defeat of any issue, or to influence the voters in any election, * * * unless there appears on such form of publication in a conspicuous place or is contained within such statement the name and residence or business address of * * * the person who issues, makes, or is responsible therefor. * * * This section does not apply to the transmittal of personal correspondence that is not reproduced by machine for general distribution."

Thus, any person who distributes a publication designed to promote the adoption or defeat of a ballot issue, without the name and address of the person responsible for such publication appearing conspicuously thereupon, violates R.C. 3599.09(A), unless such publication constitutes "personal correspondence that is not reproduced by machine for general distribution."

Appellee testified before the commission that all copies of the publication disputed herein were reproduced either by a personal computer or by a commercial printer; therefore that publication was reproduced by machine. The record further reveals that appellee distributed the publication in issue to the public generally at Blendon Middle School on April 27, 1988; no indication exists that appellee distributed that publication only to particular recipients.

A machine-reproduced publication is for general distribution if it is transmitted to the public generally, regardless of the means of such transmittal; the focus is on the identity of the recipients of the publication rather than its distributor. Hence, transmittal of a machine-reproduced publication by the person responsible therefore does not render that publication personal correspondence not for general distribution when the transmittal is made to the public generally. Since the machine-reproduced publication in issue was distributed



to the public generally, appellee's distribution of the publication falls outside the scope of the exception to R.C. 3599.09(A).

Applying R.C. 3599.09 to appellee's conduct, we note that Hayfield testified before the commission that he observed appellee distribute the publication at issue designed to promote the defeat of a Westerville City Schools tax levy, at Blendon Middle School on April 27, 1988; and that such publication did not contain the name and address of the person responsible therefor. Hayfield's testimony, combined with that of appellee, supports the commission's decision that appellee violated R.C. 3599.09(A).

Appellant's second assignment of error asserts that the common pleas court erred in determining that R.C. 3599.09(A) was unconstitutional as applied to appellee. Inasmuch as R.C. 3599.09(A) expressly prohibits the conduct in which appellee has engaged, and the record reveals no irregularity in application of the statute to appellee, we discern no distinction between the constitutionality of R.C. 3599.09(A) on its face and as applied to appellee herein. Thus, R.C. 3599.09(A) is constitutional as applied to appellee if it is constitutional on its face.

In *State* v. *Babst* (1922), 104 Ohio St. 167, the Supreme Court determined that G.C. 13343-1, the predecessor to R.C. 3599.09(A), did not violate Section 11, Article I of the Ohio Constitution. The language of the foregoing statutes is virtually identical, except that R.C. 3599.09(A) requires that a political publication contain the name and address of the person responsible therefor, whereas the statute at issue in *Babst* required that such a publication contain the name and address of a voter responsible therefor.

We cannot say that the difference between the two statutes renders *Babst* inapplicable. Nonetheless, portions of the body of the *Babst* decision suggest that the issue decided therein was the validity of excluding nonvoters as a class from assuming responsibility for political publications rather than the validity of a ban on anonymous political speech. Further, *Babst* contains no discussion of whether the state interest in

prohibiting anonymous political communications was sufficiently compelling to warrant the abridgement of free speech imposed by G.C. 13343-1 and, if so, whether the statute therein was narrowly tailored to serve that compelling state interest. In short, the text of the opinion in *Babst* leaves unclear whether the *Babst* court reached the free speech issues raised herein. However, the syllabus of *Babst* states that:

> "Section 13343-1, General Code, appearing in Part Four, Title I, Chapter 18, entitled 'Offenses Relating To Elections,' in its operation does not restrain or abridge the liberty of speech as guaranteed by Section 11, Article I, Bill of Rights, but is regulatory in nature, and intended to prevent abuse of the right."

Consequently, being bound by the syllabus of *Babst*, we are bound by its determination that R.C. 3599.09(A) is constitutional on its face with respect to free speech considerations, unless a more recent United States Supreme Court decision controls.[1]

The teachings of a more recent United States Supreme Court decision cast doubt upon the continuing viability of Babst.[2] Specifically, the United States Supreme Court determined in *Talley* v. *California* (1960), 362 U.S. 60, 80 S.Ct. 536, that a state statute prohibiting the distribution of handbills not containing the name and address of the person responsible therefore abridged the United States

[1] While *Babst* was decided solely under the free speech provisions of the Ohio Constitution, the provisions of Ohio's Constitution and those of the First Amendment to the United States Constitution, both of which appellee employs in support of her argument, appear to guarantee the same freedoms, *albeit* perhaps more explicitly stated in the Ohio Constitution.

[2] Courts in several states have relied upon the decision of the United States Supreme Court in *Talley* v. *California* (1960), 362 U.S. 60, 80 S.Ct. 536, in declaring statutes analogous to R.C. 3599.09(A) unconstitutional. See, *e.g.*, *Illinois* v. *White* (1987), 116 Ill. 2d 171, 506 N.E. 2d 1284; *Massachusetts* v. *Dennis* (1975), 329 N.E. 2d 706.



Constitution's guarantees of freedom of speech and the press. Although the statute in *Talley* was not limited to a ban on anonymous political handbills, the court therein noted the important role of anonymous political speech in promoting the exchange of ideas which might be unpopular with government authorities. *Id.* at 64-65. The *Talley* court further noted that the constitutional right to express one's views extends to communications of those views "by handbills and literature as well as by the spoken word." *Id.* at 63 (citing *Jamison* v. *Texas* (1943), 318 U.S. 413, 416).

However, *Talley* is distinguishable on its facts from the instant case; the state has a greater interest in prohibiting anonymous political communication to protect against fraudulent and corrupt practices than it has in prohibiting anonymous communications generally. Further, in decisions subsequent to *Talley*, the Supreme Court has suggested a valid interest in preventing anonymous communications in some instances. See *First National Bank of Boston* v. *Bellotti* (1978), 435 U.S. 765, 792 Fn. 32 ("* * * [i]dentification of the source of advertising may be required as a means of disclosure, so that people will be able to evaluate the arguments to which they are being subjected. * * *"); *Citizens Against Rent Control* v. *Berkeley* (1981), 454 U.S. 290, 298-299 ("* * * [t]he public interest allegedly advanced by § 602 — identifying the sources of support for and opposition to ballot measures — is insubstantial because voters may identify those sources under the provision of § 112. * * *"). Indeed, the knowledge of the source of a publication, especially a misleading one, may cause greater public discernment and evaluation than is prompted without such knowledge.

In the final analysis, while *Babst* presents obvious deficiencies, the syllabus thereof is so broad that we continue to feel bound thereby; and, if R.C. 3599.09(A) be constitutional on its face as *Babst* decided, we are unable to conclude that it is unconstitutional as applied to appellee herein. Nonetheless, given the more recent United States Supreme Court cases, this case presents a substantial issue for further analysis by the

Supreme Court. However, given *Babst*, we sustain appellant's second assignment of error, and overrule appellee's assignment of error.

Having sustained appellant's two assignments of error and overruled appellee's sole assignment of error, we reverse the judgment of the trial court, and remand for proceedings consistent herewith.

Judgment reversed
and cause remanded.

PETREE, J., concurs.
WHITESIDE, J., dissents.

WHITESIDE, J., dissenting.

Since I am unable to concur in the judgment reached by the majority, I must respectfully dissent. This is an appeal from the judgment of the Franklin County Court of Common Pleas reversing a decision of the Ohio Elections Commission ("commission") upon an R.C. 119.12 appeal.

This appeal was taken by the Ohio Election Commission.[3] Margaret McIntyre, appellee herein, but appellant in the common pleas court, appealed to that court from a decision of the commission finding appellee, McIntyre, had not violated R.C. 3517.10(D) or R.C. 3517.13(E), but had violated R.C. 3599.09 and, as a result thereof, imposed a fine of $100 upon appellee, McIntyre. Upon appeal by McIntyre from the commission decision, the common pleas court reversed, finding that the decision of the commission "* * * is not supported by the Record and represents an unconstitutional application of Section 3599.09." In its decision, the trial court stated in part:

> "* * * The Court is cognizant of the need to protect the voting process from scandalous, libelous, or

[3] No issue has been raised herein nor determined hereby as to whether the commission is an appropriate party to appeal.



> malicious attempts to degrade its integrity. The freedom to voice one's opinion either for or against an issue or a candidate must however be protected. The Court finds that the statute, as applied to Ms. McIntyre's activity, is unconstitutional. The record does not reflect any attempt by Ms. McIntyre to mislead the public nor act in a surreptitious manner. With due regard to the electoral process, the statute extends too far in requiring Ms. McIntyre to have her name, residence, or further disclaimers upon the flyer."

Appellee, McIntyre, although she has not filed a notice of appeal, raises an assignment of error as follows:

> "THE COURT BELOW RULED IMPROPERLY WHEN IT FAILED TO FIND THAT ORC 3599.09 IS OVERBROAD AND UNCONSTITUTIONAL ON ITS FACE IN THAT IT INFRINGES FIRST AMENDEMENT PROTECTED SPEECH OF INDIVIDUAL CITIZENS OF THE STATE AND NATION."

Appellee's assignment of error is not well-taken. A reading of the decision of the trial court, as quoted above, indicates that the trial court made the finding that appellee, McIntyre, contends is the law, namely that R.C. 3599.09 is overbroad and unconstitutional to the extent that it infringes upon the freedom of speech of persons in the situation of Ms. McIntyre. In effect, finding the statute would otherwise be unconstitutional, the trial court has limited the application and meaning of R.C. 3599.09 so as not to apply to an individual who personally distributes handwritten communication prepared by such individual to others so as to express to such other persons the personal views of the individual handing out such written communication.

This matter arose by the filing of a complaint and affidavit by James Michael Hayfield, which states that he observed McIntyre distributing literature at an evening meeting at Blendon Middle School, said literature relating to a primary

election at which a local ballot issue regarding an operating levy for the Westerville City Schools was on the ballot. He pointed out that the copy of the literature attached to his affidavit does not contain the "* * * name, residence or business address of the person issuing or making the statement, * * * nor * * * the name, residence or business address of the person responsible for the statement * * *." He states that he accosted Ms. McIntyre and told her she was in violation of the election law and that the next day, at a different meeting at Walnut Springs Middle School, Ms. McIntyre passed out identical literature regarding the same election, also, without identification of the person making, or responsible for, the statement therein. The affidavit was filed in March 1989. The complaint was dismissed because Hayfield failed to attend a hearing, although someone stated he was representing Hayfield without further elucidation. Prior to dismissal, however, Hayfield filed an amended affidavit apparently in response to an affidavit filed by McIntyre. Thereafter, an attorney filed a motion to reconsider on behalf of Hayfield which apparently was granted. In any event, eventually a merit hearing was conducted. At the hearing, Hayfield was identified as the Assistant Superintendent of Elementary Education of the Westerville Schools. The evidence also indicated that some of the flyers did have Ms. McIntyre's name and address on them and she stated that she intended for all of them to.

R.C. 3599.09(A) provides, in pertinent part, as follows:

> "No person shall write, print, post, or distribute, or cause to be written, printed, posted, or distributed, a notice, placard, dodger, advertisement, sample ballot, or any other form of general publication which is designed * * * to promote the adoption or defeat of any issue, or to influence the voters in any election, * * * unless there appears on such form of publication in a conspicuous place or is contained within said statement the name and residence or business address of the chairman, treasurer, or secretary of the organization issuing the same, or the person who issues, makes, or is responsible therefor. * * * This section does not apply to the transmittal of personal correspondence that is not reproduced by machine *for general distribution*." (Emphasis added.)



This case involves primarily a constitutional issue, namely the freedom of speech guaranteed by the First Amendment of the United States Constitution and made applicable to the states by the Fourteenth Amendment through the judicial doctrine of incorporation. Appellee, McIntyre, also relies upon Section 11, Article I, Ohio Constitution, which is more express as to the nature of the freedom, stating:

> "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech * * *."

Unlike the First Amendment to the United States Constitution, the Ohio constitutional provision expressly gives to each citizen not only the right to speak but, also, the right both to write and to publish sentiments on any subject. R.C. 3599.09(A) is a limitation upon the right granted by Section 11, Article I, Ohio Constitution, to write and publish sentiments on any subject. The issue then is whether the statute restrains or abridges such right to write and publish sentiments on any subject so as to be in conflict with Section 11, Article I, Ohio Constitution.

The Ohio Supreme Court has recognized the broad scope of the Ohio constitutional protection for the freedom of expression of sentiments and, in *Peltz* v. *South Euclid* (1967), 11 Ohio St. 2d 128, found unconstitutional a municipal ordinance attempting to prohibit the use of political signs in the municipalities, stating expressly that interest in aesthetics and traffic safety does not justify such a prohibition. Such ordinance was found to violate Section 11, Article I, Ohio Constitution, as well as the First and Fourteenth Amendments to

the United States Constitution. A similar conclusion was reached by the Ohio Supreme Court in *Pace* v. *Walton Hills* (1968), 15 Ohio St. 2d 51, finding the prohibition of political signs in residential districts similarly to violate Section 11, Article I, of the Ohio Constitution as well as the United States Constitution. See, however, *State* v. *Babst* (1922), 104 Ohio St. 167, *infra*, discussed in connection with the second assignment of error.

The word "abridge" means to reduce or to diminish and the word "restrain" means to limit, restrict or control.

The commission, arguing that the common pleas court decision is an abuse of discretion, as a predicate for that contention that "* * * a person need not act to mislead or act in a surreptitious manner in order to violate R.C. 3599.09. * * * It is sufficient to establish that the person distributed a document designed to promote the passage or defeat of an issue without the name and address of the person who issues the document appearing thereon in a conspicuous place." Such argument supports the trial court's determination of unconstitutionality, rather than rebuts it. Section 11, Article I, Ohio Constitution, provides that one may be held responsible for an abuse of the freedom of expression and the argument of the commission is to the effect that no abuse is necessary for there to be a restriction upon the freedoms granted by the Ohio Constitution.

The commission now argues that there was a violation of R.C. 3599.09(B) prohibiting false statements. Although the commission, in its brief herein, quotes the last paragraph of R.C. 3599.09(B), it fails to recognize the first paragraph which makes the provision applicable only to use of communication "* * * over the broadcasting facilities of any radio or television station within this state * * *." Obviously, there is no evidence that that occurred in this instance and any finding of the commission of a violation of R.C. 3599.09(B) would be patently unsupported by any evidence.

Accordingly, the first assignment of error is not well-taken.

The second assignment of error raises the constitutional issue which is the primary and controlling issue herein. The



Ohio Supreme Court has held to the effect that R.C. 3599.09(A) is facially constitutional, at least with respect to the Ohio Constitution, in *Babst, supra*, the syllabus of which states:

> "Section 13343-1, General Code, appearing in Part Four, Title I, Chapter 18, entitled 'Offenses Relating to Elections,' in its operation does not restrain or abridge the liberty of speech as guaranteed by Section 11, Article I, Bill or Rights, but is regulatory in nature, and intended to prevent abuse of the right."

Former G.C. 13343-1 read essentially similar to present R.C. 3599.09, except that it requires the name of a "voter," rather than that of a person, who was responsible for the political communication.

Although we are bound by *Babst*, we note several deficiencies to its binding effect: (1) *Babst* was decided prior to the decision of the United States Supreme Court in *Talley* v. *California* (1960), 362 U.S. 60, 80 S.Ct. 536; (2) *Babst* considered only the Ohio Constitution and did not consider the First Amendment to the United States Constitution made applicable to the states by the Fourteenth Amendment; and (3) *Babst* applied a rational basis test for constitutionality rather than the compelling state-interest test which is ordinarily applied with respect to the First Amendment abridgements. Other states have reached different conclusions than that in *Babst*, especially those cases decided subsequent to *Talley*, as is indicated in the annotation "Validity and Construction of State Statute Prohibiting Anonymous Political Advertising." Annotation (1981), 4 A.L.R. 4th 741.

In *Talley, supra*, it was held that a municipal ordinance making it a criminal offense to distribute a handbill unless it contained the names and addresses of the persons who prepared, distributed or sponsored the handbill was void on its face as abridging the freedom of speech and of the press. The statute in question is essentially similar to the ordinance found to be unconstitutional in *Talley*, except that the statute is limited in scope to communications urging the election or

defeat of either a candidate for public office or an issue. The question, therefore, is whether there is sufficient state interest of a different nature so as to justify the statute's infringement upon First Amendment rights.

In *Citizens Against Rent Control* v. *Berkeley* (1981), 454 U.S. 290, 102 S.Ct. 434, the Supreme Court found unconstitutional an ordinance limiting to $250 contributions to committees formed to support or oppose ballot measures submitted to a vote of the people. In the majority opinion, Chief Justice Burger stated at 294:

> "* * * [T]hat regulation of First Amendment rights is always subject to exacting judicial review.
>
> "We begin by recalling that the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process. The 18th-century Committees of Correspondence and the pamphleteers were early examples of this phenomena and the Federalist Papers were perhaps the most significant and lasting example. The tradition of volunteer committees for collective action has manifested itself in myriad community and public activities; in the political process it can focus on a candidate or on a ballot measure. Its value is that by collective effort individuals can make their views known, when, individually, their voices would be faint or lost."

Here, there is no indication of collective action but, instead, attempted written communication by a single person who passed out written statements that she herself prepared.

In holding that a state could not prohibit corporations from making contributions or expenditures advocating views on ballot issues, the United States Supreme Court in *First National Bank of Boston* v. *Bellotti* (1978), 435 U.S. 765, 98 S.Ct. 1407, stated at 1423-1424:

> "* * * Referenda are held on issues, not candidates for public office. The risk of corruption perceived in cases



> involving candidates elections * * * simply is not present in a popular vote on a public issue. To be sure, corporate advertising may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it: The Constitution 'protects expression which is eloquent no less than that which is unconvincing.' *Kingsley Int'l Pictures Corp.* v. *Regents*, 360 U.S., at 689, 79 S.Ct., at 1365. * * * Moreover, the people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider, in making their judgment, the source and credibility of the advocate. * * *"

In footnote 32, at page 1424 of the opinion, it is stated:

> "* * * Identification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected. * * *"

*Talley*, *supra*, is neither mentioned nor distinguished.

Upon the issue of facial invalidity of R.C. 3599.09, including the overbreadth issue, we are bound by *Babst*, *supra*, only with respect to the Ohio Constitution.

Accordingly, the issue we must determine is whether the common pleas court erred in finding R.C. 3599.09 unconstitutional as applied to appellee's, McIntyre's activities, because it otherwise would be unconstitutional because of overbreadth under the First Amendment of the United States Constitution. Presumably, the appellant, commission, as well as the complainant, school official, would concede that appellee, McIntyre, has a right to voice her views either at the meeting involved, or outside the meeting, without identifying herself by giving her name and address. The question before us is whether appellee, McIntyre, may, likewise, voice such personal views by written communication similarly without

stating her name and address. The views were those of the person handing out the paper who had composed the message on the paper herself. There was no anonymous communication. The person who was asserting the views was there for all to see, even though they might not know her name or address.

The *Babst* court, in effect, found only a rational-basis test to be utilized to determine the constitutionality of the statute under the Ohio Constitution. While this may be debateable, we are bound by *Babst*. On the other hand, for federal constitutional purposes, a compelling state-interest test must be applied with respect to infringements upon the freedom of speech guaranteed by the First Amendment. In light of *Talley* and *Citizens Against Rent Control*, no other conclusion can be reached except that the statute, R.C. 3599.09(A), is unconstitutional because of overbreadth in violation of the First Amendment to the United States Constitution. The dicta in footnote 32 of *First National Bank of Boston, supra*, was a comment directed only at corporate political contributors, not at individuals attempting to express their individual personal views by personally giving to others a written communication they had prepared. As pointed out in the majority opinion, other state courts have reached the same conclusion reached in this dissent. Interestingly, as construed by the majority, that statute would have prohibited distribution of Federalist papers which helped establish our nation and constitution.

In order to preserve its constitutionality, we must construe R.C. 3599.09(A) to apply only to anonymous communications. R.C. 3599.09(A) implictly recognizes this necessary exception by the provision that "* * * [t]his section does not apply to the transmittal of personal correspondence that is not reproduced by machine for general distribution." This was a personal communication being handed out by the person making the communication. Although it was reproduced by machine, such reproduction was not for "general" distribution but, rather, for distribution by the person who was making the communication and giving the message. To be consistent with the freedom of speech provisions of the United States and Ohio Constitutions, we must construe[4] the exception to apply to all written communications, whether or not machine reproduced, that are intended only for personal distribution by the person making the communication and not for general distribution. At least, the evidence herein indicates that all of the papers not bearing the name and address of a person were personally distributed by appellee, McIntyre. Although there is some evidence that her children may have passed out some literature, there is no evidence that the papers passed out by them did not contain appellee's, McIntyre's, name and address. Rather, there is evidence that at least some of the papers did, in fact, contain her name and address.



Nevertheless, to the extent that appellee, McIntyre, personally distributed written communications to persons, R.C. 3599.09(A) is not applicable. We agree with the trial court that, if not so construed, the statute would be unconstitutional as applied to appellee, McIntyre. However, as noted above, the exception sentence is so phrased as to be capable of construction as to exclude from the statute's operation papers and handbills, etc., prepared and personally distributed by the person whose views are expressed, so as to avoid the finding of unconstitutionality. We need not determine whether the statute is overbroad in any other respect since appellee, McIntyre, raises the overbreadth issue only with respect to persons in her situation.

Therefore, even assuming that the trial court erred in finding the statute unconstitutional (rather than construing it not to be applicable) any such error is harmless and nonprejudicial since properly construed to avoid the constitutional conflict, the statute does not apply to appellee's, McIntyre's, activities. Therefore, since the statute does not apply to appellee's, McIntyre's, activities, the trial court properly found

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[4] Although as a strict matter of statutory construction, it is difficult to argue with the analysis of the majority opinion, that is not the issue. Rather, the issue is whether the construction expressed herein is a reasonable limiting construction to avoid the statute's being void for overbreadth.

that the commission's decision that appellee, McIntyre, violated R.C. 3599.09(A) is both contrary to law and unsupported by reliable, probative and substantial evidence. For there reasons, the second assignment of error is not well-taken.

For the forgoing reasons, all the assignments of error should be overruled, and the judgment of the Franklin County Court of Common Pleas should be affirmed.



IN THE COURT OF COMMON PLEAS,
FRANKLIN COUNTY, OHIO

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CASE NO. 90CVF 04 2835
JUDGE THOMPSON

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MARGARET McINTYRE,
Appellant,

vs.

OHIO ELECTIONS COMMISSION,
Appellee.

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**DECISION**
Rendered this ____ day of September 1990

THOMPSON, J.

This matter comes before the Court upon appeal by Margaret McIntyre from a Decision of the Ohio Elections Commission (Commission) dated March 30, 1990. The Commission found that Ms. McIntyre violated R.C. Section 3599.09. That section provides in part:

> (A) No person shall write, print, post, or distribute, or cause to be written, printed, posted, or distributed, a notice, placard, dodger, advertisement, sample ballot, or any other form of general publication which is designed . . . to promote the adoption or defeat of any issue, or to influence the voters in any election, . . . magazines, outdoor advertising facilities, direct mailings, or other similar types of general public political advertising, or through flyers, handbills, or other non-periodical printed matter, unless there appears on such form of publication in a conspicuous place or is contained within said statement the name and residence or business address of the chairman,

treasurer, or secretary of the organization issuing the same, or the person who issues, makes, or is responsible therefore.

* * *

No person shall use or cause to be used a false, fictitious, or fraudulent name or address in the making or issuing of a publication or communication included within the provisions of this section."

The subject of the violation found by the Commission was a flyer passed out by Ms. McIntyre which expressed her negative views with respect to a Westerville school tax levy. It was titled "CONCERNED PARENTS AND TAXPAYERS" and for the sake of this Decision it will be assumed that some of those flyers were distributed with neither Ms. McIntyre's name or address upon them.

Two cases have dealt with Section 3599. *In re Pirko* (1988), 44 O. App.3d 3, addressed whether a pamphlet was a false statement. The court held that despite being misleading it would not be considered false. The court further held that the statement was to be strictly scrutinized with respect to any possible penal violation that would be assessed by the State. The case of *Pestrak* v. *The Ohio Elections Commission* (1988), 677 F. Supp. 543 (S.D.), went further in declaring Section 3599.09 invalid as a prior restraint of free speech as protected under the First Amendment.

It is the conclusion of this Court that the reasoning in *Pestrak* is equally applicable in this case. While it may be that Section 3599.09 could be considered unconstitutional on its face, this Court has a duty to construe the statute constitutional, if possible. *Bishop* v. *Hybud* (1988), 76 O. App.3d 55. The Court is cognizant of the need to protect the voting process from scandalous, libelous, or malicious attempts to degrade its integrity. The freedom to voice one's opinion either for or against an issue or a candidate must however be protected. The Court finds that the statute, as applied to Ms. McIntyre's activity, is unconstitutional. The record does not



reflect any attempt by Ms. McIntyre to mislead the public nor act in a surreptitious manner. With due regard to the electoral process, the statute extends too far in requiring Ms. McIntyre to have her name, residence, or further disclaimers upon the flyer.

There is further no support for the Commission's finding, if there was such, that Ms. McIntyre used a false or fictitious or fraudulent name with respect to "CONCERNED PARENTS AND TAXPAYERS".

The Court finds that the Commission's Decision as to a violation of R.C. Section 3599.09 by Ms. McIntyre is not supported by the Record and is in fact unconstitutionally applied. The Decision of the Commission is REVERSED.

Counsel for Appellant shall prepare a judgment entry accordingly.

/s/ TOMMY L. THOMPSON, JUDGE

cc:

GEORGE Q. VAILE, Esq.
Counsel for Appellant

CATHERINE M. COLA, Esq., AAG.
Counsel for Appellee

## OHIO REVISED CODE

**§ 3599.09 Political communications must be identified; penalty.**

(A) No person shall write, print, post, or distribute, or cause to be written, printed, posted, or distributed, a notice, placard, dodger, advertisement, sample ballot, or any other form of general publication which is designed to promote the nomination or election or defeat of a candidate, or to promote the adoption or defeat of any issue, or to influence the voters in any election, or make an expenditure for the purpose of financing political communications through newspapers, magazines, outdoor advertising facilities, direct mailings, or other similar types of general public political advertising, or through flyers, handbills, or other non-periodical printed matter, unless there appears on such form of publication in a conspicuous place or is contained within said statement the name and residence or business address of the chairman, treasurer, or secretary of the organization issuing the same, or the person who issues, makes, or is responsible therefore. The disclaimer "paid political advertisement" is not sufficient to meet the requirements of this division. When such publication is issued by the regularly constituted central or executive committee of a political party, organized as provided in Chapter 3517. of the Revised Code, it shall be sufficiently identified if it bears the name of the committee and its chairman or treasurer. No person, firm, or corporation shall print or reproduce any notice, placard, dodger, advertisement, sample ballot, or any other form of publication in violation of this section. This section does not apply to the transmittal of personal correspondence that is not reproduced by machine for general distribution.

The secretary of state may, by rule, exempt, from the requirements of this division, printed matter and certain other kinds of printed communications such as campaign buttons, balloons, pencils, or like items, the size or nature of which



makes it unreasonable to add an identification or disclaimer. The disclaimer or identification, when paid for by a campaign committee, shall be identified by the words "paid for by" followed by the name and address of the campaign committee and the appropriate officer of the committee, identified by name and title.

## [Leaflet Distributed at Blendon Middle School]

VOTE NO

ISSUE 19 SCHOOL TAX LEVY

Last election Westerville Schools, asked us to vote yes for new buildings and expansions programs. We gave them what they asked. We knew there was crowded conditions and new growth in the district.

Now we find out there is a 4 million dollar deficit - WHY?

We are told the 3 middle schools must be split because of over-crowding, and yet we are told 3 schools are being closed - WHY?

A magnet school is not a full operating school, but a specials school.

Residents were asked to work on a 20 member commission to help formulate the new boundaries For 4 weeks they worked long and hard and came up with a very workable plan. Their plan was totally disregarded - WHY?

WASTE of tax payers dollars must be stopped. Our children's education and welfare must come first. WASTE CAN NO LONGER BE TOLERATED.

PLEASE VOTE NO

ISSUE 19

THANK YOU,

CONCERNED PARENTS
AND
TAX PAYERS



## [Leaflet Distributed at Walnut Springs Meeting]

VOTE NO

ISSUE 19 SCHOOL TAX LEVY

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PLEASE VOTE NO

ISSUE 19

THANK YOU,

CONCERNED PARENTS
AND
TAX PAYERS

NOT PAID FOR BY PUBLIC FUNDS

# [Finding of Ohio Elections Commission]

Ohio Elections Commission
State Office Tower, 14th Floor
Columbus, Ohio 43266-0418
(614) 466-2585

March 30, 1990

CASE NO. 89A-9
Hayfield v. McIntyre

TO: Margaret McIntyre

Please be advised that the Ohio Elections Commission adopted the following finding(s) in the above-referenced case at its meeting of March 19, 1990:

That there is no violation of Ohio's Revised Code section(s) 3517.10(D) and 3517.13(E).

That there is a violation of Ohio Revised Code section 3599.09 and therefore, the Commission imposes upon Margaret McIntyre a fine of $100.

The above fines must be paid no later than thirty days after the date of this letter. Payment should be made payable to The Ohio Elections Commission at the above address.

If you have any questions, please feel free to contact me.

Very truly yours,

Roger F. Deal
Commission Counsel

RFD:ds

cc: Jennifer L. Brunner

ooznt